competence of the Congress to deal with such matter at all. The delegation by the Constitution to the President and the Senate of the power to make "treaties" does not exhaust the power of the United States over international relations. The will of the nation in this domain may be expressed through other acts than "treaties" and such acts do not necessarily need to be ratified by the President by and with the advice and consent of the Senate in order to be valid and binding, unless they so expressly provide by their own terms. In short, the power of the President and the Senate to regulate foreign relations is not an exclusive power; it is only when an agreement takes the form of a "treaty," as that term is used in the Constitution, that this power belongs exclusively to them. There is no inconsistency between the authority of the President and the Senate to regulate foreign relations through agreements in the form of "treaties" and the power of the President and Congress to deal with matters of foreign policy through legislative action. Which of the two procedures shall be employed in a given case is a matter of practical convenience or political expediency rather than of constitutional or international law. If the procedure of treaty regulation proves ineffective in a particular case because of the constitutional impediment relative to ratification, there is no reason of constitutional or international law why recourse to the easier alternative of legislative action cannot be had, if the President and a majority of the two Houses of Congress so desire, as has been done with success on various occasions in the past.

JAMES W. GARNER

DECLARATORY JUDGMENTS IN INTERNATIONAL LAW

In its decisions No. 7 and No. 13 [1] and on other occasions [2] the Permanent Court of International Justice has asserted its power to render "purely declaratory judgments," that is, judgments between litigants which conclusively determine their rights but to which no coercive decree is appended. The Permanent Court affirmed in Judgment No. 7 that Article 63 of the Statute of the Court,[3] as well as Article 36 providing for obligatory jurisdiction for the determination of a question of law or fact,[4] contemplated judgments having a "purely declaratory effect." In Judgment No. 13 the court stated that Judgment No. 7, on the legal position of the German-owned factory at Chorzow, was "in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation at law, once and for all and with binding force as between the parties; so that the legal position

[1] Series A. No. 7, p. 19; A. No. 13, p. 20. [2] Series B. No. 11, p. 30.

[3] "Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify [them]; . . . the construction given by the judgment will be equally binding upon it."

[4] *I.e.*, jurisdiction over "the interpretation of a treaty" or "any question of international law" or "the existence of any fact which, if established, would constitute a breach of an international obligation."

thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned."

In one sense it may be said that every decision of an international tribunal results in a judgment merely declaring the rights of the parties without coercive decree. International tribunals are not equipped with sheriffs to execute the judgment, and such judgments depend for their enforcement on the disposition of nations to carry them out. But it is interesting to note that very rarely indeed has a nation that has submitted to arbitration been so defiant of public opinion and the *mores* as to refuse to carry out an unfavorable award or judgment. The adjudication of a disputed boundary or title to land is nothing but a declaratory judgment, and both international tribunals and municipal courts like the United States Supreme Court have long exercised this function.

In theory, however, a judgment that A is under a duty to B to pay money or deliver property is regarded by some as not strictly declaratory. This is a matter of definition. But even assuming the validity of this view, there remains a large sphere of usefulness for judgments merely adjudicating and establishing the rights of contesting parties in types of cases not now common. It has heretofore been generally assumed even in private law that courts exist mainly for curative purposes to redress past grievances on the initiative of the complaining party. Insufficient attention has been given to the fact that courts have a vast preventive function to perform, namely, to adjudicate disputes before either party has acted on his own assumption as to his rights and broken the *status quo*. We are more accustomed to this phenomenon in international law than in private law, hence it ought not to be difficult to convince the statesmen of the world that the utility of adjudication can be greatly enhanced to the benefit of peace and legality generally by enabling a party normally the defendant to initiate an action for a declaration that he or it is not liable as charged. It should be recognized in international law, as it now is in private law since the enactment of declaratory judgments statutes, that a party erroneously charged has a legal interest in the adjudication of the issue raised and should be privileged to initiate the proceeding.

Such new use can also be made of the declaratory judgment, as in private law, to enable the party who claims the right to be released or to escape from a liability or obligation, to initiate an action against the accuser or promisee for a so-called "negative" declaratory judgment that the party plaintiff is not liable as charged, or a judgment that he is released by change of circumstances or conditions from the obligation once contracted.

The first of these cases has had several illustrations in recent years. One of the most striking is the charge made by Yugoslavia against Hungary that the latter was guilty of an international delinquency in harboring Yugoslav or other refugees who from Hungary plotted the assassination of King Alexander. This grave charge for a time threatened the most serious conse-

quences. Hungary disclaimed liability. Why should it not have been possible in theory for Hungary to institute an action before the Permanent Court of International Justice seeking a judgment on the facts and the law to the effect that it was not liable as charged? The Council of the League dealt with it as a political question, and encouraged the negotiations which removed the charge as an immediate potential basis of friction.

Mussolini has made against Ethiopia charges of violating the legal rights of Italy. The privilege of the party charged to convert the issue into an immediately legal one by instituting a judicial action for a judgment of non-liability might afford an opportunity to establish the truth of such charges instead of permitting them to fester into open conflict without any adjudication or of permitting an ostensible legal ground to be used as a cover for political designs. Any pause to the temptation of an aggrieved state to become plaintiff, judge and sheriff in its own cause ought to be a source of gratification.

In theory again, it might have prevented the current deterioration of European political relations had Austria been privileged in 1931 to initiate the proceeding against France and Italy prior to the actual conclusion of the proposed Customs Union with Germany, but on submission of the draft and the announced intention to conclude it, seeking a declaration from the Permanent Court that under the Treaty of St. Germain and the 1922 Geneva Protocol, Austria was privileged to enter into the contested Customs Union without violating those treaties. Had the issue been raised before the *fait accompli*, the atmosphere for a strictly judicial opinion would have been improved; but in any event, it might have prevented that panic which ultimately had such damaging psychological effects on the pacification of Europe and perhaps from the start foredoomed to failure the Conference on the Limitation of Armaments. As Congressman Gilbert of Kentucky said in 1928 with reference to the then pending Federal Declaratory Judgments Bill: "Under the present law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under the declaratory judgments law you turn on the light and then take the step."

The other and equally necessary adjunct to existing forms of international procedure is to enable a party to a treaty or a promissor of an international obligation who claims that time and circumstance justify release from the obligation to initiate the proceeding for a judicial declaration of release. In Anglo-American law we are accustomed to this proceeding in many aspects, for example, on the part of a covenantor in a building or other land restriction extending over a long period who claims that the obligation has been extinguished, but instead of first departing from the covenant and risking damages and forfeiture, sues first for an adjudication of the current invalidity of the old restriction. If a favorable judgment is given, he has the certainty that he is no longer bound and is privileged to proceed accordingly.[5] So

[5] See Hess *v.* Country Club Park, 213 Cal. 613, 2 Pac. (2d) 782 (1931); Great Britain, Law

debtors may sue creditors for a declaration that they do not owe the amount claimed or that for some other reason they are released in whole or in part from the ostensible obligation. The necessity for such judicial relief is even more insistent in international than in private law. For whereas in private law legislatures are enabled to alter the law, the parties to treaties do not usually provide means for revision or the machinery for determining when a treaty should be terminated. The doctrine of *pacta sunt servanda* is often abused to give a supposed moral sanction to treaties, imposed under political duress, which every party to the treaty is well aware will not be observed beyond the time when the force which imposed it is lifted or diverted. The very difficulty of applying the doctrine of *rebus sic stantibus* makes it the more important to provide for nations that do not necessarily wish to be lawless a judicial method for determining when they are released from a treaty, the obsolescence of which may be disputed by the parties and which a party charged is thus constrained either to observe under duress or protest, or else to break and risk all the political consequences. International law, primitive and inadequate as it is in many respects to deal with the acute problems which agitate this hard world should, with the establishment of international tribunals, have reached sufficient maturity to enable a promissor who claims the legal right to be released from his obligation to have the opportunity of invoking a judicial decision and thus making unnecessary the political recourse which is now frequently his only remedy by reason of the want of a legal alternative. It is the duty of statesmanship to supply opportunities for adjudication and thereby remove the temptation to political and unilateral recourse with all its attendant risks and dangers. Such opportunity would make it less necessary to invoke the doctrine of necessity which, while hardly dismissible in such an immature system of law as the international, nevertheless awakens emotional currents dangerous to a legal order.

Treaties relating to territorial matters are often founded upon assumptions as to the state of physical or geographical facts and conditions. Maps have occasionally proved misleading, physical landmarks were often wrongly assumed to be in particular territory. When later it is discovered that the assumption involved substantial error of an essential kind, theory and practice both admit the voidability of the treaty at the hands of the party prejudiced. It is said that the minds have not met, that there is a *vice du consentement.* Instead of remitting either party to the dangerous expedient of denouncing the treaty on the unilateral conclusion of error or of its essential or vital character, a matter of degree on which opinions may justifiably differ, the opportunity for judicial recourse by way of declaratory judgment might avoid the necessity or temptation to resort to such precarious expedient.

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of Property Act, 1925, 15 Geo. V, C. 20, sec. 84; and Borchard, Declaratory Judgments (Cleveland, 1934), pp. 325–329.

Treaties often involve reciprocal obligations, and the question has arisen whether the alleged breach by one party of one or more stipulations of the treaty justifies the other party in repudiating or claiming relief from the reciprocal obligations of the treaty, in whole or in part. The other party or parties to the treaty before proceeding on the supposition that the act proposed or consummated constitutes in reality a breach and discharges them from the performance of further obligations under the treaty, should have the privilege of seeking a judicial declaration as to the legal effect of the disputed act and of its consequences in discharging the petitioning state from further obligations under the treaty, or otherwise. During the European War of 1914 many English firms found it important to obtain a judicial construction of their long-term contracts with German firms to determine whether the war had terminated the contracts and released them entirely from, or merely suspended during the period of the war, obligations which would have to be resumed in normal course when the war was over.[6] Upon the answer to the question of construction propounded depended the plans of the plaintiffs for the conduct of their post-war business, and it was important that they be not left in suspense but know with authoritative accuracy their legal position toward the German defendants.

In a rapidly changing world new developments of all kinds have effect on treaties bilateral and multilateral, the exact scope, nature and legal consequences of which it is difficult to establish and which at all events it is unwise to endeavor unilaterally to determine. It should be possible in all such cases for any of the parties placed in doubt, difficulty or jeopardy by such a possibly operative fact, to obtain the assurance against all other interested parties of a judicial declaration substituting certainty for uncertainty and clarity for doubt and jeopardy. We shall thus enlarge the scope of legal control and proportionately narrow the area of political action.

EDWIN M. BORCHARD

THE CONFLICT OF LAWS RESTATEMENT

The publication in January, 1935, of the completed Restatement of the Law of Conflict of Laws by the American Law Institute was an event of great importance in the development of private international law. It relates to conflicts of law not only between the states of the Union, but also between the law of foreign countries and the local law in an issue pending before a State or Federal court.

The Restatement was adopted and promulgated in its present form at the meeting of the American Law Institute in Washington on May 11, 1934, but its publication was deferred for necessary editorial changes and for adapta-

[6] Ertel Bieber & Co. *v.* Rio Tinto Co. (C. A.) [1918] A. C. 260; Zinc Corp. *v.* Hersch (C. A.) [1916] 1 K. B. 541; Hugh Stevenson & Sons *v.* Akt. für Cartonnagen-Industrie (H. L.) [1918] A. C. 239. Borchard, *op. cit.*, 319.